SYNOPSIS

The present Petition challenges the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("**IT Rules, 2021**" or "**Impugned Rules**") as being *ultra vires* the Information Technology Act, 2000 ("**parent Act**"), in as much as they set up a classification of 'publishers of news and current affairs content' ("**digital news portals"**) as part of 'digital media', and seek to regulate these news portals under Part III of the Rules ("**Impugned Part**") by imposing Government oversight and a 'Code of Ethics', which stipulates such vague conditions as 'good taste', 'decency' etc. - matters nowhere within the contemplation of the parent Act. The Petitioners bring out wholly digital news and current affairs publications and are therefore directly affected by this overreach by way of subordinate legislation. The Petitioners' digital news portals publish news and views, as distinct from curated content. The present Petition challenges the IT Rules, 2021 only in so far as they affect digital news portals, and is not with reference to 'publishers of online curated content', i.e., OTT media platforms or any other entities sought to be regulated by the Impugned Rules.

The Press Council Act, 1978 is a statute with express provisions to regulate newspapers and that too without Government interference. The Cable Television Networks (Regulation) Act, 1995, contains express provisions to impose a programme code and for cable television to be regulated by the Central Government. By contrast, the Information Technology Act neither intends nor provides for the imposition of a programme code, or regulation of news portals in any manner. Yet, this is sought to be done through subordinate legislation, the IT Rules, 2021.

Information Technology Act, 2000

The object and purport of the parent Act is as follows:

> *"An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as — electronic commerce, which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Banker's Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto".*

The parent IT Act is limited to providing legal recognition, authentication and facilitation of interchange of electronic data and electronic communication, and its receipt as evidence. Moreover, the parent Act does not envisage or provide for regulation of electronic content, except in two distinct ways:

(i) Constituting offences limited to cyber terrorism (Section 66-F), obscene material (Section 67), sexually explicit material (Section 67-A), child pornography (Section 67-B) and others such as tampering, theft that are not currently relevant.
None of these offences are of any relevance to a digital news portal.

(ii) Blocking of sites under Section 69-A by a direction to intermediaries in the interest of *sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing*

> *incitement to the commission of any cognizable offence relating to these.*

While the parent Act provides for offences of a specific kind committed in the form of electronic data, (seldom found in a news and current affairs publication), its purport is not at all to regulate content in any other manner. Even Section 69-A, as the Supreme Court recognized in ***Shreya Singhal v. Union of India*** (2015) 5 SCC 1, is limited to a well-defined class of entities called '*intermediaries',* and 'Government agencies'. The Section reads as under:

> *S. 69-A Power to issue directions for blocking for public access of any information through any computer resource. -*
>
> *(1) Where the Central Government or any of its officers specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.*
>
> *(2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.*
>
> *(3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine.*

Therefore, even by way of Section 69-A, there is no scope to dictate content to news media portals. Section 69-A envisages only two targets of its

directions, i.e. an "agency of the Government" or "intermediary". The Petitioners are neither. The entire Part III of the Impugned Rules that seeks to set up a regulatory mechanism for digital media is *ultra vires* the parent Act. And if allowed to stand it would be so arbitrary and unwarranted an intrusion on expression, as to render it *ultra vires* the parent Act on that score alone or throw a doubt upon the validity of the parent Act.

Notably, an offence under Section 66-A penalising content which is 'offensive' or causes 'annoyance' was struck down on grounds of vagueness by the Supreme Court in ***Shreya Singhal v Union Of India*** (2015) 5 SCC 1. The IT Rules, 2021 go far beyond the remit of the parent Act and seek to regulate digital news media by imposing a 'Code of Ethics', with all manner of stipulations as to 'half-truths', 'good taste', 'decency' etc., and vest the power of interference ultimately with the Central Government as the chief regulator, at the highest of three tiers.

The Impugned Rules bring back some elements of Section 66-A and go far beyond it, by way of prescription, to be administered, adjudicated upon and supervised by the Government. Thus, they not only exceed the parent Act, but also contravene the Supreme Court's ruling in *Shreya Singhal*, and therefore will not be saved by any general rule-making power under Section 87(1) that is limited to carrying out the provisions of the parent Act.

The IT Rules, 2021 are purportedly made under Section 87(1) of the parent Act, more particularly Section 87(2)(z) & (zg) which respectively enable Rules to be framed on:- "the procedure and safeguards for blocking for

access by the public under Section 69-A(2)" and "guidelines to be observed by the intermediaries under Section 79(2)". Therefore, Section 87(2)(zg) is not applicable to digital news media as they are not intermediaries either as per the Act or as per the Impugned Rules. Rules sourced to Section 87(2)(z), naturally, cannot travel beyond the terms of Section 69-A, which as stated above, is limited to 'intermediaries' or 'agency of the Government' and that too on grounds relating to security interests of the State.

Scheme of the Rules

Relevant Definitions in the IT Rules, 2021.

'**Digital media'** is defined by **Rule 2(1)(i)** as content carried by either an intermediary or a 'publisher'. Note that the two are mutually exclusive terms.

News and analysis of current affairs, which when made available over the internet and computer networks is defined as **'news and current affairs content' by Rule 2(1)(m)**, but when this is published as loosely folded sheets with newsprint it would be **'newspaper' defined by Rule 2(1)(n)**. 'Newspaper' is not covered by the IT Rules, 2021 but 'news and current affairs content' is. '**Publisher of news and current affairs content**' is separately defined in **Rule 2(1)(t)** as follows:

> 'publisher of news and current affairs content' means an online paper, news portal, news aggregator, news agency and such other entity called by whatever name, which is functionally similar to publishers of news and current affairs content but shall not include newspapers, replica e-papers of the newspaper and any individual or user who is not transmitting content in the course of systematic business, professional or commercial activity;

Significantly, none of these definitions are found in the parent Act and are all brought in by the IT Rules, 2021 with the express purpose of regulating their content.

Regulation

Subject Entities

The IT Rules, 2021 purport to regulate publishers and intermediaries. The manner of regulation is in two parts: *one,* due diligence norms to be followed by 'intermediaries' (Part II of the Rules); *two,* Code of Ethics to be followed by 'publishers' (Part III of the Rules i.e. the Impugned Part).

Code of Ethics for publishers

A Code of Ethics is laid down, as per the Appendix referred to in Rule 9. The Code of Ethics for 'publishers of news and current affairs content' consists of the Programme Code under the Cable Television Networks (Regulation) Act, 1995; Journalistic Norms under the Press Council Act, 1978; and a blanket prohibition against content that is prohibited by any law.

Regime to supervise news content

Rule 9 sets up a three-tier structure to ensure 'observance and adherence' to the Code of Ethics.

Level 1: '*Self-regulation' by the publisher* - Grievance redressal officer to be set up by the publisher to take up a complaint by "any person having a grievance regarding content" (Rules 10,11)

Level 2: '*Self-regulating body/bodies*' (actually a misnomer) of an appellate nature constituted by publishers or their associations, of independent persons, but subject to the Ministry's approval. This Level 2 body has the power to warn or censure, require the publisher to apologize or display a warning/disclaimer. Note that their procedure is bound hand and foot by the Rules which obligate Level 2 bodies to refer matters of non-compliance, and a certain class of content to Level 3 for deletion or modification of the same. (Rule 12)

Level 3: '*Oversight mechanism' by the Central Government* - This is an Inter-Departmental Committee, headed by an Authorised Officer of the Government of India, and consisting chiefly of serving officials from various Ministries. The Committee can directly take complaints referred to it by the Ministry of I&B. It also operates as a second appellate forum over decisions of Levels 1 and 2. In addition to the power to recommend to the Ministry of I&B, to issue various binding directions for perceived non-compliance, such as publication of apology, displaying a warning/disclaimer, etc., the Committee also has the power to recommend to the Ministry, draconian measures such as ordering the modification, deletion or blocking of content on certain perceived dangers. Such drastic orders are subject only to approval of the Secretary of the Ministry of I&B. (Rules 13-15)

Emergency Power

In addition to all of the above, there is an 'emergency power' reserved with the Secretary of Ministry of I&B to pass interim orders blocking any content without even giving an opportunity of hearing. (Rule 16)

The overreach

The scope of the parent Act is limited to providing for recognition of electronic data and it refers to entities and content in very generic terms. It contemplates regulation of content only by creating a select set of offences, to be prosecuted and judicially assessed. (Offences relating to sexually explicit material etc. are generally not applicable to news and current affairs publications) Only intermediaries, who are immune from prosecution of offences under Section 79, are subject to a Government action of blocking. The IT Rules, 2021, however, introduce a distinct category of entities, purely on the strength of their being publishers of news and current affairs content, to be subjected to an adjudicatory mechanism parallel to Courts of law, on a range of grounds which are not even offences under the parent Act.

Even the purported source of rule-making, in this case, Section 69-A of the parent Act, does not:

a. cover any direction to or regulation of any entity other than intermediaries, and news media is <u>not an intermediary, or considered one by the Act or the Impugned Rules</u>
b. go beyond blocking as an emergent measure in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States, public order, or for preventing incitement to the commission of any cognizable offence relating to these.

Section 69-A of the parent Act, under which the Impugned Part has been framed, provides for blocking *intermediaries* when required in the interests as aforesaid. The IT Rules, 2021, however, go on to impose upon the *non*

intermediary digital news media a three-tier regulatory system to administer a loose-ranging Code of Ethics that contains wide and vague terms as ‘half-truths’, ‘good taste’, ‘decency’, ‘suggestive innuendos’, etc. They also prescribe censure, warning, requiring an apology etc. in this regard as also on counts of ‘defamation’ etc. As stated above, this is contrary to the Supreme Court judgment in *Shreya Singhal* that struck down Section 66-A.

The Rules introduce a special class of entities, obligate a Code of Ethics and further, obligate digital news portals and other entities to set up a ‘grievance’ redressal mechanism that deals with simply ‘any’ person’s complaint, wherein every which decision is subject to scrutiny of a higher regulatory tier, and non-compliance may be escalated to a still higher tier that is headed by a serving Central Government Officer and a Committee of other serving officers. Simply put, upon the merest complaint, Central Government interference is triggered on all manner of content - far beyond that which is mentioned in Section 69-A. The complaint may simply be that some content in a news report or editorial is a ‘half-truth’ or adverse to the social or moral life of the country. A Government oversight of news media content lies nowhere within the scope of the Act.

Whether news agencies and commentators on current affairs should be subjected to a Code of Ethics is not the question. The question is whether regulation and oversight by the Government or its agents can be prescribed by the Rules when not contemplated by the parent Act (though such an exercise even by Parliament would be open to serious challenge).

There is no unlimited right of delegation and subordinate legislation cannot go beyond the object and the scope of the parent Act. If such Rule

or Regulation goes beyond what the parent Act contemplates, then it becomes *ultra vires* the parent Act, as held by a 3-judge bench of the Hon'ble Supreme Court, in ***Ajoy Kumar Banerjee v Union of India*** (1984) 3 SCC 127.

The Petitioners are therefore challenging the IT Rules, 2021 as being *ultra vires* the IT Act, 2000. The Petitioners believe that the present is a case that should succeed on this ground. However, it is not the case of the Petitioners that Government control of freedom of expression as is enabled under the Rules is not liable to a broader constitutional challenge. It is respectfully submitted that the present challenge to the IT Rules, 2021 as being *ultra vires* the parent Act is without prejudice to the right to raise such a constitutional challenge in or by appropriate proceedings/ applications.

LIST OF DATES

17.10.2000	Information Technology Act, 2000 enacted by Parliament was brought into force.
27.10.2009	An amendment was brought in, which, among other things, added Section 66-A to the Information Technology Act, 2000.
27.10.2009	The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 were issued under Section 69-A(2) of the Information Technology Act, 2000.

11.04.2011	The Information Technology (Intermediaries Guidelines) Rules, 2011 were issued under Section 79(2) of the Information Technology Act, 2000.
24.03.2015	***Shreya Singhal v Union of India*** (2015) 5 SCC 1 was decided, wherein, Section 66-A of the Act was struck down in its entirety; Section 69-A and the 2009 Rules were upheld; and Section 79 and the 2011 Rules were held to be valid, subject to a reading down of Section 79(3)(b) and Rule 3(4).
25.02.2021	The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, were issued under Sections 69-A(2) and 79(2), and in supersession of the Information Technology (Intermediaries Guidelines) Rules, 2011. The IT Rules, 2021, *inter alia*, seek to regulate digital news portals under Part III, by imposing Government oversight and a 'Code of Ethics' on them, and therefore, go far beyond the object and scope of the IT Act.
26.02.2021	DigiPub News India Foundation, an association of digital news media organizations, registered under Section 8 of the Companies Act, and of which Petitioner No.1 is a member, sent a representation to the Ministry of Electronics and Information Technology, and the Ministry of Information and Broadcasting, *inter alia*, asking for a repeal of the IT Rules, 2021. No response has been received till date.

01.03.2021	Executive action seeking to enforce compliance in respect of the Impugned Rules has already commenced. For instance, Mr. Paojel Chaoba, a senior journalist who is the executive editor of "The Frontier Manipur" was served with a notice dated 01.03.2021, issued by the jurisdictional District Magistrate, to report compliance with the Impugned Rules. It was later reported in the press that the said notice was withdrawn. An Affidavit dated 03.03.2021 has been obtained from Mr. Chaoba in this regard.
06.03.2021	Hence this Petition.

FILED BY: -

Filed on:- 06.03.2021

Place: - New Delhi

PRASANNA S,

VINOOTHNA VINJAM & BHARAT GUPTA

ADVOCATES FOR THE PETITIONERS

[redacted]

IN THE HIGH COURT OF DELHI, AT NEW DELHI

EXTRAORDINARY CIVIL WRIT JURISDICTION

WRIT PETITION (CIVIL) NO._____ OF 2021

IN THE MATTER OF:

FOUNDATION FOR INDEPENDENT JOURNALISM & ORS

…Petitioners

Versus

UNION OF INDIA & ANR. …Respondents

WRIT PETITION PRAYING FOR THE ISSUANCE OF A WRIT OF DECLARATION OR ANY OTHER APPROPRIATE WRIT, ORDER OR DIRECTION, DECLARING THE INFORMATION TECHNOLOGY (INTERMEDIARY GUIDELINES AND DIGITAL MEDIA ETHICS CODE) RULES, 2021 AS VOID AND INOPERATIVE INSOFAR AS THEY DEFINE AND APPLY TO PUBLISHERS OF NEWS AND CURRENT AFFAIRS CONTENT, AND PART III, INSOFAR AS IT REGULATES PUBLISHERS OF NEWS AND CURRENT AFFAIRS CONTENT, FOR BEING ULTRA VIRES THE INFORMATION TECHNOLOGY ACT, 2000

To

HON'BLE THE CHIEF JUSTICE AND

HIS COMPANION JUSTICES OF THE HIGH COURT OF DELHI AT NEW DELHI

MOST RESPECTFULLY SHOWETH THAT :-

1. This Writ Petition challenges the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("**IT Rules, 2021**" or "**Impugned Rules**") as being *ultra vires* the Information Technology Act, 2000 ("**parent Act**"), on the

ground that they go far beyond the remit of the parent Act, insofar as the said Rules purport to apply to publishers of news and current affairs content ("**digital news portals**") and, consequently regulate them by Part III ("**Impugned Part**") of the same.

2. The IT Rules, 2021 have been notified and published in the Official Gazette on 25th February, 2021 and have come into effect from that date. A true copy of the IT Rules, 2021 issued on 25.02.2021 is annexed herewith and marked as **ANNEXURE-P-1**. The Impugned Rules enable the Government to virtually dictate content to digital news portals, and they introduce digital portals with 'news and current affairs content' as a specific and targeted class to be subject to regulation by a loose-ranging 'Code of Ethics', and to be consummately overseen by Central Government officers, all of which goes beyond the object and scope of the parent Act.
3. The present Petition challenges the IT Rules, 2021 only insofar as they affect digital news portals, and is not with reference to 'publishers of online curated content', i.e., OTT media platforms or any other entities sought to be regulated by the Impugned Rules.

Parties

4. **Petitioner No.1** is Foundation for Independent Journalism, a Section 8 Company, incorporated and registered in Delhi. Petitioner No.1 publishes the digital news portal 'The Wire', which is predominantly written content, in English, Hindi, Urdu and Marathi. **Petitioner No.2** is M K Venu, Director of Foundation for Independent Journalism, and Founding Editor of 'The Wire' published by Petitioner No.1. **Petitioner No.3** is the founder and Editor-in-Chief of 'The News Minute' which is a Bengaluru-based news and current affairs digital publication. The Petitioners are all

publishers of news and current affairs content on the digital media and hence sought to be covered by the Impugned Part of the IT Rules, 2021, and are therefore adversely affected by the same. Further, the Petitioners operate within the territory of India and conduct 'systematic business activity' making their content available in India, and therefore fall within the purview of the IT Rules, 2021, under Rule 8.

5. **Respondent No.1** is the Union of India through the Secretary, Ministry of Electronics and Information Technology, through whom the Impugned Rules have been issued. **Respondent No.2** is the Secretary, Ministry of Information and Broadcasting who also exercises powers under the Impugned Rules. Both Respondents are in New Delhi.

Scheme of the Information Technology Act, 2000

6. The purpose and the purport of the parent Act is as follows:

> *"An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as — electronic commerce, which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Banker's Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto".*

7. Pursuant to the above purpose, the entities of which the parent Act took cognizance, were all generic users of information technology. The content to be regulated by the parent Act, as offences, was limited to sexually explicit material, child pornography, showing

private parts of individuals, cyber terrorism, etc. to be prosecuted and tried by normal courts. The Supreme Court in ***Shreya Singhal v Union of India*** (2015) 5 SCC 1 struck down, on the ground of vagueness, Section 66-A, which constituted as an offence, transmitting offensive, annoying, menacing electronic material.

8. The Impugned Rules intend to regulate content on vague and subjective standards as provided in the Code of Ethics, such as 'half-truths', 'good taste', 'decency', etc.. Even when such a Section was contemplated by the parent Act, the Supreme Court struck it down. Now, without any statutory peg, similar grounds are sought to be brought in by the Impugned Rules, which not only undoes *Shreya Singhal,* but goes beyond even what is contemplated by Section 69-A, in terms of which the Impugned Part purports to be made.
9. Save and except for providing against a narrow band of content by way of offences and blocking public access by way of a direction to intermediaries, again, on limited grounds, the parent Act does not contemplate any regulation of content, but the Impugned Rules do. Any attempt to bring in such regulatory provisions, through subordinate/delegated legislation would clearly be outside the scope of the parent Act, and in excess of the rule-making power delegated under Section 87 of the parent Act.
10. Specifically, the IT Rules, 2021, state as a source of their power, Section 87(2)(z) and (zg).
11. Section 87(2)(zg) is relatable to Section 79, which, in view of the immunity from prosecution, allows for a special dispensation with respect to intermediaries, and is limited to intermediaries. The definition of intermediaries in the parent Act and the scheme of the IT Rules, 2021 make it clear that publishers are distinct from intermediaries. Note that a publisher is not even defined or dealt with

in the parent Act. Therefore, Section 79 does not concern any *non-intermediary news media platform*, and the Impugned Part cannot be sourced to Section 87(2)(zg).

12. On the other hand, Section 87(2)(z) is relatable to Section 69-A, again limited to issuing a direction to an intermediary or any Government agency, and does not contemplate regulating news media at all. Most of the matters in the Code of Ethics are beyond Section 69-A even otherwise.

Scheme of IT Rules, 2021

13. The IT Rules, 2021 introduce two distinct sets of regulations: *one,* due diligence norms to be followed by 'intermediaries' (Part II of the Rules); *two,* Code of Ethics ought to be adhered to by 'publishers', along with a three-tier compliance mechanism (Part III of the Rules).

14. While Part II pertains to intermediaries, an entity recognised and regulated by the IT Act (and not the subject of challenge in the present petition), Part III of the IT Rules, 2021, i.e., the Impugned Part, pertains to two distinct sets of 'publishers':

    (i) publishers of news and current affairs content

    (ii) publishers of online curated content

15. It is important to note that these two entities have been newly introduced in the IT Rules, 2021, and the terms 'publisher' and 'publisher of news and current affairs content' are defined as follows:

> *(s) 'publisher' means a publisher of news and current affairs content or a publisher of online curated content;*
>
> *(t) 'publisher of news and current affairs content' means an online paper, news portal, news aggregator, news agency and such other entity called by whatever name, which is functionally similar to*

publishers of news and current affairs content but shall not include newspapers, replica e-papers of the newspaper and any individual or user who is not transmitting content in the course of systematic business, professional or commercial activity;

16. Further, the terms 'content' and 'news and current affairs content' are defined as follows:

(g) 'content' means the electronic record defined in clause (t) of section 2 of the Act;

(m) 'news and current affairs content' includes newly received or noteworthy content, including analysis, especially about recent events primarily of socio-political, economic or cultural nature, made available over the internet or computer networks, and any digital media shall be news and current affairs content where the context, substance, purpose, import and meaning of such information is in the nature of news and current affairs content.

Code of Ethics

17. Rule 9 of the IT Rules, 2021 (read with the Appendix) lays down a separate Code of Ethics for the two kinds of publishers. The Code of Ethics, in case of publishers of news and current affairs content (which includes the Petitioners) is as follows:

i. Norms of Journalistic Conduct of the Press Council of India under the Press Council Act, 1978; (A true copy of which is annexed herewith and marked as **ANNEXURE-P-2**)

ii. Programme Code under Section 5 of the Cable Television Networks (Regulation) Act, 1995; (A true copy which is annexed herewith and marked as **ANNEXURE-P-3**).

iii. Content which is prohibited under any law for the time being in force shall not be published or transmitted.

18. It is pertinent to note that the Norms of Journalistic Conduct and Programme Code are extremely broad in their sweep, covering within their ambit things like 'good taste' and 'decency', which by their nature are subjective. Thus, the IT Rules, 2021, by incorporating these by reference, and making them part of the regulatory mechanism, have stepped outside the remit of Section 69-A of the parent Act, which was upheld noting its narrow scope and the manner of operation of the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009. A true copy of the 2009 Rules is annexed herewith and marked as **ANNEXURE-P-4.**

19. Moreover, a sweeping Governmental oversight has been introduced in all such matters, by way of a three-tier compliance mechanism, which is as follows:

Level 1 (Rules 10,11): '*Self-regulation' by the publisher* - Grievance redressal officer to be set up by the publisher to take up a complaint by "any person having a grievance regarding content"

Level 2 (Rule 12): '*Self-regulation' by 'self-regulating bodies' of the publishers* - A self-regulating body of an appellate nature, constituted by publishers or their associations, of independent persons, but subject to Government approval. This body has the power to warn or censure, require the publisher to apologize, or display a warning/disclaimer. Their procedure is bound hand and foot by the Rules which obligate Level 2 bodies to refer matters of non-compliance, and a certain class of content to Level 3 for deletion or modification of the same.

Level 3 (Rules 13-15): *Oversight mechanism by the Central Government* - An Inter-Departmental Committee, headed by an Authorised Officer of the Government of India, and composed of representatives from various Ministries (and domain experts, if added). The Committee has the power to take up complaints referred to it by the Level 2 body or even directly by the Ministry of I&B. In addition to the power to recommend to the Ministry of I&B to issue various binding directions for perceived non-compliance, such as publication of an apology, displaying a warning/disclaimer, etc., the Committee also has the power to recommend to the Ministry, draconian measures such as ordering the modification, deletion or blocking of content. Such drastic orders are subject only to approval of the Secretary of the Ministry of I&B. The grounds on which such deletion or modification may be made are:

I. To prevent incitement to the commission of a cognisable offence relating to public order (Rule 14(5)(e))

II. Grounds enumerated under Section 69-A, that is, sovereignty and integrity of India, security of State, defence of India, friendly relations with foreign States, public order or to prevent incitement to the commission of any cognizable offence relating to the above. (Rule 14(5)(f))

In addition to all of the above, there is an 'emergency power' reserved with the Secretary of Ministry of I&B, to pass interim orders blocking any content without even giving the publishers an opportunity of hearing. (Rule 16)

20. DigiPub News India Foundation, an association of digital news media organizations, registered under Section 8 of the Companies Act, and of which Petitioner No.1 is a member, sent a representation to the Ministry of Electronics and Information Technology, and the Ministry of Information and Broadcasting, *inter alia*, asking for a repeal of the IT Rules, 2021. No response has been received till date. A true copy of the representation is annexed herewith and marked as **ANNEXURE-P-5.**

21. It is submitted that Executive action seeking to enforce compliance in respect of the Impugned Rules has already commenced. For instance, Mr. Paojel Chaoba, a senior journalist who is the executive editor of "The Frontier Manipur" was served with a notice dated 01.03.2021, issued by the jurisdictional District Magistrate, to report compliance with the Impugned Rules. It was later reported in the press that the said notice was withdrawn. An Affidavit dated 03.03.2021 has been obtained from Mr. Chaoba in this regard and a true copy of the same along with the notice is annexed herewith and marked as **ANNEXURE-P-6**.

GROUNDS

22. The reliefs prayed for in this Writ Petition are claimed on the following grounds, each of which is taken both alternatively and cumulatively and without prejudice to each other. The Petitioners crave liberty to urge additional grounds. However, the Petitioners do not concede to the Constitutional *vires* of the Impugned Rules. The present petition may please be considered by this Hon'ble Court without prejudice to the Petitioners' right to raise such a

constitutional challenge in or by appropriate proceedings/ applications.

A. It is well-settled in law that there is no unlimited right of delegation, and that subordinate legislation cannot go beyond the object and the scope of the parent Act. Any Rule or Regulation made in exercise of delegated power has to be in consonance with the parent Act, and if such Rule or Regulation goes beyond what the parent Act contemplates, then it becomes *ultra vires* the parent Act. A 3-judge bench of the Hon'ble Supreme Court, in ***Ajoy Kumar Banerjee v Union of India*** (1984) 3 SCC 127 held that a Scheme introduced by the Ministry of Finance was *ultra vires* the parent Act, the General Insurance Business (Nationalisation) Act, 1972, as the said Scheme was not related to and went beyond the object envisaged in the parent Act. The Court held as follows:

> "26. ... it is evident that the scheme of 1980 impugned in these petitions is not related to the object envisaged in sub-section (2) of Section 16 of the Act. In order to be warranted by the object of delegated legislation as explained in the memorandum to the Bill which incorporated Section 16 of the Act, read with the preamble of the Act, unless it can be said that the scheme is related to sub-section (2) of Section 16 of the Act, it would be an exercise of power beyond delegation. The duty of the Court in interpreting or construing a provision is to read the section, and understand its meaning in the context. Interpretation of a provision or statute is not a mere exercise in semantics but an attempt to find out the meaning of the legislation from the words used, understand the context and the purpose of the expressions used and then to construe the expressions sensibly."

B. Similarly, in ***Assam Co. Ltd. v. State of Assam*****,** (2001) 4 SCC 202 at page 208, it was held:

> "It is an established principle that the power to make rules under an Act is derived from the enabling provision found in such

> an Act. Therefore, it is fundamental that a delegate on whom such power is conferred has to act within the limits of the authority conferred by the Act and it cannot enlarge the scope of the Act. A delegate cannot override the Act either by exceeding the authority or by making provision which is inconsistent with the Act. Any rule made in exercise of such delegated power has to be in consonance with the provisions of the Act, and if the rule goes beyond what the Act contemplates, the rule becomes in excess of the power delegated under the Act, and if it does any of the above, the rule becomes ultra vires the Act."

C. In the present case, though the parent Act deals with electronic data/record, the object and purpose of the parent Act, is primarily to provide for legal recognition of such electronic data/record, recognise means of electronic communication, authenticate and establish conditions in which electronic data/record could be considered as evidence, and to recognise offences committed through the use of computer resources. The object is not to regulate content beyond this, except insofar as intermediaries, who are separately immunised. Therefore, the parent Act does not recognise digital news media as a separate category of entities and does not seek to subject them or their content to any set of special regulations. The Impugned Part of the Rules, to the extent that it seeks to achieve such special regulation or control of digital media including online news platforms, is manifestly *ultra vires* the parent Act.

D. Allowing a regulatory regime to be established in respect of the digital media industry is like allowing power looms to be regulated under the Electricity Act merely because they employ and use electric power in the course of their business; or allowing the practice and profession of plumbing to be regulated under the Water Act.

E. Section 69-A is a limited and specific emergent power as described by the Supreme Court in S*hreya Singhal*. The Impugned Rules

cannot therefore purport to regulate digital news portals by requiring them to abide by the Code of Ethics. In doing so, the Rules essentially extend the application of two legislations: the Cable Television Networks (Regulation) Act, 1995 and Press Council Act, 1978, to digital news media, to the extent of the Programme Code and the Norms of Journalistic Conduct stipulated under these legislations respectively.

F. It is noteworthy that both under the Press Council Act, 1978 and the Cable Television Networks (Regulation) Act, 1995, the journalistic norms and the programme code are expressly provided for under the plenary legislations. The Press Council Act is a statute with express provisions to regulate newspapers, without Government interference, wherein Section 13(2)(b) expressly specifies it as a function of the Council to 'build up a code of conduct'. Similarly, under the Cable Television Networks Act, there is power under Section 5, read with Section 19, to impose a programme code on cable television operators, to be regulated by the Government. By contrast, the Information Technology Act neither intends nor provides for the imposition of a programme code, or regulation of news portals in any manner. Yet, this is sought to be done through subordinate legislation, the IT Rules, 2021.

G. The IT Rules, 2021 expand the scope of the Act even further by providing for a Code of Ethics and a three-tier regulatory system to administer a loose-ranging Code of Ethics, that contains wide and vague terms as 'half-truths', 'good taste', 'decency'. Therefore, such an oversight includes and extends far beyond categories of content as provided for under Section 66-A, which was struck-down in

Shreya Singhal. Furthermore, the three-tier regulatory system also has the power to censure, warn, require an apology, etc. in this regard, as also on counts of 'defamation' etc. As stated above, this is contrary to the Supreme Court judgment in *Shreya Singhal* that struck down Section 66-A.

H. Simply put, in three fundamental ways the IT Rules, 2021 are *ultra vires* the parent Act:

   i. They purport to virtually legislate on the conduct of entities, not even within the ken of the parent Act.

   ii. They travel beyond the specific enabling Sections and introduce new concepts and regulations.

   iii. They attempt to proscribe content on the basis of vague and subjective grounds which the Supreme Court has already voided when it struck down Section 66-A of the parent Act in *Shreya Singhal*.

I. The IT Rules, 2021 have been issued under S. 87(2)(z) and (zg). The rule-making power under S. 87(2)(zg) is with respect to guidelines for intermediaries, therefore, the Impugned Part cannot be sourced to S. 87(2)(zg), since the Impugned Part applies only to non-intermediaries such as 'publishers of news and current affairs content' and 'publishers of curated content', which are both distinct from 'intermediary' as defined and understood in the parent Act. This distinction is also evident from the scheme of the IT Rules, 2021.

J. On the other hand, Section 87(2)(z) is geared to the procedure and safeguards for blocking public access to information on a computer, by way of direction to intermediaries, or any Government agency,

and not to any other entity such as a publisher of news and current affairs content. Further, even intermediaries can only be given directions on limited grounds. Section 69-A, to the extent relevant, reads as follows:

> "Where the Central Government or any of its officers specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may, … by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource."

Section 69-A refers to blocking of information on the internet, that can only be done on extraordinary grounds such as in the interest of national security, etc., and it does not at all purport to generally regulate or censor news media. The Government implements its power to block information under Section 69-A by directing intermediaries, such as social media intermediaries and Internet Service Providers to delete social media posts or to block access to certain pages/URLs. But in no manner does the parent Section empower the Government to direct publishers to delete content, make changes, or publish apologies. The Rules cannot therefore regulate digital news media by requiring them to abide by the Code of Ethics, by extending other legislations and Rules to digital news media. Therefore, the IT Rules, 2021 go completely beyond the object and scope of Section 69-A of the parent Act.

There is a difference between emergent power under Section 69-A with respect to blocking by way of a direction to intermediaries, and

a mechanism to routinely assess, edit and modify content of news publications, therefore, the IT Rules, 2021 cannot be countenanced.

K. Further, the IT Rules, 2021 provide for an oversight mechanism in the Impugned Part, including the setting up of an Inter-Departmental Committee which has the power to hear grievances regarding compliance with the said Code of Ethics, as well as the power to recommend to the Ministry of I&B, draconian measures such as ordering the deletion, modification of content or blocking the same. The Rules framed under the parent Act cannot set up an adjudicatory mechanism parallel to Courts of law, which is completely beyond the object and scope of the parent Act.

L. The enabling provision in the Act conferring Rule making power on the Central Government in the instant case is Section 87(1) wherein such power is "to carry out the provisions of [the] Act". Even the specific provisions under Section 87(2) are relatable to one or more express provisions of the parent Act. It is submitted that the purpose of the Impugned Part of the IT Rules, 2021 is regulation of digital news media entities which is not contemplated under any of the provisions of the Act or its objects.

M. It is well-settled that Rules made dehors a 'statutory peg' are invalid and have no effect in law. In ***V. Sudeer v. Bar Council of India***, (1999) 3 SCC 176, the Supreme Court, while striking down provisions in the Bar Council of India Rules that imposed conditions for enrolment as an advocate, held as follows:

> **"20.** We may now refer to Section 49 of the Act, which deals with the general power of the Bar Council of India to make rules. Sub-section (1) thereof lays down that the Bar Council of

India may make rules for discharging its functions under this Act, and, in particular, such rules may prescribe on various topics as enumerated therein from clauses (a) to (j). **A mere look at the aforesaid provision makes it clear that the rule-making power entrusted to the Bar Council of India by the legislature is an ancillary power for fructifying and effectively discharging its statutory functions laid down by the Act**. Consequently, rules to be framed under Section 49(1) **must have a statutory peg on which to hang. If there is no such statutory peg, the rule which is sought to be enacted dehors such a peg will have no foothold and will become stillborn**. The statutory functions entrusted by the legislature to the Bar Council of India under the Act so far as relevant for our present purpose and which could be relied upon by Shri Rao, learned Senior Counsel for the respondent-Bar Council of India, are Section 7(1)(h) and Section 24(3)(d). **We have seen earlier that neither of these statutory provisions entitles the Bar Council of India to provide for the disqualification or a disability or an additional condition for enrolment of a person who is otherwise eligible to be enrolled as an advocate under Section 24(1). Once that conclusion is reached, the very foundation for supporting the impugned Rules gets knocked off**. Consequently, if any such rule is framed, supposedly by exercise of the rule-making power as enumerated in Section 49(1)(af), (ag) or (ah) on which also reliance was placed by Shri Rao, the said rule having not been made for discharging any of the statutory functions of the Bar Council of India in this connection must necessarily fail as it would be ultra vires the statutory functions of the Bar Council of India. Any rule framed by the rule-making authority going beyond its statutory functions must necessarily be held to be ultra vires and inoperative at law. Consequently, the valiant attempt made by Shri Rao for sustaining the Rules under Section 49(1)(af), (ag) and (ah) would remain abortive only on this short ground."

(Emphasis supplied)

N. Whenever a substantive burden of duties and obligations is to be cast upon any person, as in the present case, the same must have express statutory sanction. For instance, in the case of taxation powers, which similarly place burdens on the persons subject to the statute, it is settled law that the power to levy tax must have express statutory

backing. For instance, in ***Bimal Chandra Banerjee v. State of M.P***. (1970) 2 SCC 467, the Hon'ble Court struck down as *ultra vires,* rules providing for a levy on liquor that was not lifted by the contractors even though the statutory rule-making power was couched in broad and general terms, on the following grounds:

> **"13.** Neither Section 25 nor Section 26 nor Section 27 nor Section 62(1) or clauses (d) and (h) of Section 62(2) empower the rule-making authority viz. the State Government to levy tax on excisable articles which have not been either imported, exported, transported, manufactured, cultivated or collected under any licence granted under Section 13 or manufactured in any distillery established or any distillery or brewery licensed under the Act. **The Legislature has levied excise duty only on those articles which come within the scope of Section 25. The rule-making authority has not been conferred with any power to levy duty on any articles which do not fall within the scope of Section 25.** Therefore it is not necessary to consider whether any such power can be conferred on that authority. **Quite clearly the State Government purported to levy duty on liquor which the contractors failed to lift. In so doing it was attempting to exercise a power which it did not possess.**
>
> **14. No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive.** The basis of the statutory power conferred by the statute cannot be transgressed by the rule-making authority. **A rule-making authority has no plenary power. It has to act within the limits of the power granted to it**."
>
> (Emphasis supplied)

O. A Division Bench of this Hon'ble Court in in ***Durga Chand Kaushish v. Union of India***, 1979 SCC OnLine Del 103, ILR (1979) 2 Del 730 struck down as *ultra vires* a statutory order, purportedly under the Cinematograph Act, 1952*,* by the L-G that imposed price restriction on cinema admissions – on the grounds *inter alia* that

firstly, there was not even a whisper of price control powers to be within the scope and ambit of the Cinematograph Act, although it dealt with cinematograph films and their exhibition in general; secondly, that price control powers have traditionally been expressly and specifically provided for under plenary enactments and not as subordinate legislation, and held as follows:

> **"11.** From a perusal and careful scrutiny of these provisions we do not find any provision which provides for price control either as purpose or as a means to achieve a stated purpose. **The only purpose of Part III of the Act is to ensure safety of persons attending exhibition of films as emphasised by Section 12.** …
>
> **12. We have examined the provisions of the 1952 Act to find out if the same disclose, "either apparently or otherwise", a policy guiding the exercise of power claimed to be derived from the enactment.** With this in mind, we may re-examine the concluding words of sub-section (2) of Section 12 "…..on such terms and conditions and subject to such restrictions as it may determine". **These words may appear wide and unrestricted but it cannot be emphasised enough that they have to be read in the context in which they appear and must be understood to mean only such conditions and restrictions as pertain to the purpose of Part III** which is set out in sub-section (1) of Section 12.
>
> **13.** We have, therefore, no hesitation in coming to the conclusion that **regulation of the rates of admission to cinema auditoriums is not a policy stated in the 1952 Act**. **It is neither a purpose sought to be achieved by the said Act not a means to achieving any other purpose stated in the Act**.
>
> ***
>
> **17.** The history of legislation on the subject is referred to in the Statement of Objects and reasons of the Cinematograph Act, 1918. The 1918 act was followed by the present Act. In the statement of Objects and Reasons of this Act, it is recalled that the 1918 Act dealt with "two separate matters, namely, (a) examination and certification of films as suitable for public exhibition and (b) regulation of cinemas including their licensing".

> **20. It is, thus, clear that the 1918 Act did not contain even a whisper about the control of the rates of admission to cinema auditoriums…**
>
> **22. This makes it clear that neither the 1918 Act nor the 1952 Act seek to achieve the purpose of controlling the rates of admission to cinema auditoriums or any purpose akin thereto.**. It was only by a notification dated 6th May, 1965 that rule 45 was amended by introducing sub-rule (xiii) and by introducing condition 8A in Schedule 2 to the said Rules. By doing so, the rule-making authority sought to introduce a wholly new dimension to the purposes of the legislation on the subject after nearly 47 years by a mere executive fiat."
>
> (Emphasis supplied)

Essential Legislative Function

P. It is well-settled that the essential legislative function, which includes declaring the legislative policy and laying down the standard that is to be enacted into a rule of law, cannot be delegated. In ***Ajoy Kumar Banerjee v Union of India*** (1984) 3 SCC 127, it was held as follows:

> "**The Legislature must retain in its own hand the essential legislative function which consists in declaring the legislative policy and lay down the standard which is to be enacted into a rule of law, and what can be delegated in the task of subordinate legislation which by very nature is ancillary to the statute which delegates the power to make it effective provided the legislative policy is enunciated with sufficient clearness or a standard laid down**… we must bear in mind the observations of Mukherjee, J. in In re the Delhi Laws Act, 1912 case to the following effect:
>
> > "The essential legislative function consists in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. It is open to the Legislature to formulate the policy as broadly and with as little or as much details as it thinks proper and it may delegate the rest of the legislative work to a subordinate

> authority who will work out of the details within the framework of that policy."

Q. Regulation of digital or online news media is an essential legislative function. To the extent that the rule-making power is read to sanction an entire regulatory scheme, it amounts to delegation of essential legislative function, which cannot be countenanced.

R. No reading of the rule-making power will allow for an entire regulatory regime for all digital news media entities without express statutory sanction, for that will run the danger of adversely affecting fundamental rights. Given such grave consequences, rule-making power has to be read strictly. It is therefore imperative that this Hon'ble Court supplies a constitutionally sound reading of the rule-making power under the Act and holds the Impugned Part of the IT Rules, 2021 *ultra vires* the rule-making power under the parent Act. Such a reading is also supported by a plain reading of the parent Act.

23. The Petitioners have not filed any other Petition or proceedings before this High Court, any other High Court, Supreme Court or any other court or tribunal for the reliefs prayed for herein or any other similar relief. This Petition is *bona fide*.

PRAYERS

In the premises, this Hon'ble Court may be pleased to issue appropriate declarations, writs, orders and directions as set out below:

a) Pass a Writ of Declaration or any other appropriate writ, order or direction, declaring the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 as void and

inoperative insofar as they define and apply to publishers of news and current affairs content, and Part III, insofar as it regulates publishers of news and current affairs content, for being *ultra vires* the Information Technology Act, 2000;

b) Pass any other order or direction that this Hon'ble Court may deem just and proper in the facts and circumstances of this case.

AND FOR THIS ACT OF KINDNESS, THE PETITIONERS SHALL, AS IS DUTY BOUND EVER PRAY

Filed on:- 06.03.2021

Place: - New Delhi

PRASANNA S,

VINOOTHNA VINJAM

& BHARAT GUPTA

ADVOCATES FOR THE PETITIONERS

[redacted]